



DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1952

[Docket No. OSHA-2022-0008]

RIN 1218-AD41

Massachusetts State Plan for State and Local Government Employers; Notification of Submission; Proposal to Grant Initial State Plan Approval; Request for Public Comment and Opportunity to Request Public Hearing

AGENCY: Occupational Safety and Health Administration (OSHA), Labor.

ACTION: Proposed rule; request for written comments; notification of opportunity to request informal public hearing.

SUMMARY: The Massachusetts Department of Labor Standards (the DLS) has submitted a developmental State Plan for occupational safety and health, applicable only to State and local Government employment (workers of the State and its political subdivisions) (Massachusetts State Plan), for determination of initial approval under Section 18 of the Occupational Safety and Health Act of 1970 (the OSH Act). In this notification, OSHA proposes to grant the Massachusetts State Plan initial approval based on its preliminary assessment that the Massachusetts State Plan meets, or will meet within three years, OSHA's State Plan approval criteria, and that Massachusetts has provided adequate assurances that it will be at least as effective as Federal OSHA in protecting the safety and health of Massachusetts state and local government workers. OSHA proposes to fund initial approval of the Massachusetts State Plan from the State Plan funding available in the Department of Labor's Fiscal Year 2022 budget.

DATES:

Written Comments: Comments and requests for a hearing must be submitted by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Informal public hearing: Any interested person may request an informal hearing concerning the initial approval of the State Plan. OSHA will hold such a hearing if the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) finds that substantial objections have been filed. After the close of the comment period, the Assistant Secretary will review all comments submitted; will review all hearing requests; and will schedule an informal hearing if a hearing is required to resolve substantial issues.

Publication in Massachusetts: No later than 5 days following the date of publication of this notification in the *Federal Register*, Massachusetts shall publish, or cause to be published, reasonable notice within the State containing the same information contained herein.

ADDRESSES:

Written comments: You may submit written comments and requests for an informal hearing electronically at www.regulations.gov, which is the Federal e-Rulemaking Portal. Follow the online instructions for making electronic submissions.

Instructions. All submissions must include the agency's name and the docket number for this rulemaking (Docket No. OSHA-2021-0008).¹ All comments, including any personal information you provide, are placed in the public docket without change and may be made available online at www.regulations.gov. Therefore, OSHA cautions commenters about submitting information they do not want made available to the public or submitting materials that contain personal information (either about themselves or

¹ Documents submitted to the docket by OSHA or stakeholders are assigned document identification numbers (Document ID) for easy identification and retrieval. The full Document ID is the docket number plus a unique four-digit code.

others), such as Social Security Numbers and birthdates. Submissions must clearly identify the issues addressed and the positions taken.

Docket: To read or download comments or other material in the docket, go to Docket No. OSHA-2022-0008 at www.regulations.gov. All comments and submissions are listed in the www.regulations.gov index; however, some information (e.g., copyrighted material) is not publicly available to read or download through that website. All comments and submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Contact the OSHA Docket Office at (202) 693-2350 (TTY (877)889-5627) for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Contact Frank Meilinger, Director, OSHA Office of Communications, U.S. Department of Labor; telephone: (202) 693-1999; email: meilinger.francis2@dol.gov.

For general and technical information: Contact Douglas J. Kalinowski, Director, OSHA Directorate of Cooperative and State Programs, U.S. Department of Labor; telephone: (202) 693-2200; email: kalinowski.doug@dol.gov.

SUPPLEMENTARY INFORMATION:

I. Background

Section 18 of the OSH Act, 29 U.S.C. 667, provides that a State which desires to assume responsibility for the development and enforcement of standards relating to any occupational safety and health issue with respect to a Federal standard which has been promulgated may submit a State Plan to the Assistant Secretary of Labor for Occupational Safety and Health (Assistant Secretary) documenting the proposed program in detail. State and local government employers are excluded from Federal OSHA coverage under the Act (29 U.S.C. 652(5)). However, a State may submit a State Plan for the development and enforcement of occupational safety and health standards applicable

only to employees of the State and its political subdivisions (State and local Government employees) (29 CFR 1956.1). The Assistant Secretary will approve a State Plan for State and local Government employees if the Plan provides for the development and enforcement of standards relating to hazards in employment covered by the Plan which are or will be at least as effective in providing safe and healthful employment and places of employment as standards promulgated and enforced under Section 6 of the Act, giving due consideration to differences between State and local Government and private sector employment (29 U.S.C. 667(c); 29 CFR 1956.2(a)). In making this determination, the Assistant Secretary will measure the State Plan against the criteria and indices of effectiveness set forth in 29 CFR part 1956.10 and 1956.11 (29 CFR 1956.2(a)). A State Plan for an occupational safety and health program for State and local Government employees may be approved although it does not yet fully meet this criteria, if it includes satisfactory assurances by the State that it will take the necessary steps to bring the program into conformity with these criteria within the 3-year period immediately following the commencement of the State Plan's operation (29 CFR 1956.2(b)(1)). In such case, the developmental State Plan must include the specific actions (referred to as developmental steps) that the State Plan must take and a schedule for their accomplishment, not to exceed 3 years. Once a State and local Government State Plan has completed the developmental steps, Federal OSHA will publish a notification in the *Federal Register* certifying the State Plan's completion of all developmental steps (29 CFR 1956.23; 29 CFR 1902.33 and 1902.34).

Section 23(g) of the OSH Act provides for funding of up to 50% of the State Plan costs (29 U.S.C. 672(g)). Congress designates specific funds for this purpose (see, e.g., FY 2022 Consolidated Appropriations Act, H.R. 2471 at page 383 (March 17, 2022)).

II. Massachusetts State Plan History

The DLS has a history that traces back to 1912. Although the agency's name has changed slightly over time, the mission of the DLS has always included promoting and protecting workers' health, safety, and working conditions. In 2014, by statute, Massachusetts authorized the DLS to provide State workers with at least the level of protection from workplace safety and health hazards as protections provided under the OSH Act by Federal OSHA (M.G.L. c. 149, § 6½). The DLS's authority to provide such protection was expanded to cover all State and local Government workers, including any political subdivision of the Commonwealth, which includes municipal and county workers, by amendment to the authorizing statute in 2018. Since 2019, the DLS, through its Workplace Safety and Health Program (WSHP), has performed inspections of State and local government employers to ensure compliance with these requirements.

The DLS began working with OSHA to obtain approval for a State Plan for occupational safety and health, applicable only to State and local Government employment, and submitted a draft Plan to OSHA in December 2020, with final revisions to the Plan in June 2022. The revised Plan has been found to be conceptually approvable as a developmental State Plan.

In Fiscal Year 2022, Congress increased the funds available for State Plans. The Fiscal Year 2022 Omnibus Appropriations Act includes \$1,250,000 in State Plan grant funds for the Massachusetts State Plan.

III. Description of the Massachusetts State Plan

Massachusetts designates the DLS as the State agency responsible for administering the Plan throughout the State. A narrative describing the Massachusetts State Plan in detail is included in the docket of this rulemaking at www.regulations.gov.

Under the Massachusetts State Plan's enabling legislation, M.G.L. c. 149, §§ 6 and 6½, the DLS has authority to adopt standards and regulations and enforce and administer laws and rules protecting the safety and health of workers of the State and its

political subdivisions. The DLS has adopted Federal OSHA occupational safety and health standards through rulemaking. OSHA's standards are incorporated into the Code of Massachusetts Regulations (CMR) at 454 CMR 25.02. The DLS has provided assurances that it will timely adopt identical or at least as effective standards or enforcement policies in the future, whenever OSHA adopts standards and regulations, revisions to existing standards, or enforcement policies that OSHA determines necessary for the enforcement of such standards. The DLS has also provided assurances that it will adopt such standards, policy changes, or requirements that are at least as effective as Federal OSHA's within six months of Federal promulgation (30 days for any emergency temporary standard) in accordance with the requirements set forth at 29 CFR 1953.5.

In addition, the DLS has provided assurances that variances may not be granted unless it is established that adequate protection is afforded to employees under the terms of the variance. Current DLS provisions for granting variances, found at 454 CMR 25.05(6), are inconsistent with OSHA's permanent variance procedure. Therefore, during its developmental period, Massachusetts has provided assurances that it intends to complete the developmental step of amending 454 CMR 25.05 to modify its variance requirements to become consistent with those in the Act and also adopt OSHA's regulation governing variances, 29 CFR part 1905.

The DLS has authority under M.G.L. c. 149, §§ 6, 6½, 10 and 17, and 454 CMR 25.03 to inspect covered workplaces. This authority includes provisions for right of entry for inspection, prohibition of advance notice of inspection, and employers' obligations to maintain records and provide reports as required. 454 CMR 25.02, as authorized through M.G.L. c. 149, § 6 ½, incorporates OSHA's regulation governing inspections and citations, 29 CFR part 1903, which includes, among other requirements, provision for inspections in response to employee complaints, for written notification if the determination is made that a complaint does not warrant an inspection, and for posting

written civil citations, pursuant to 29 CFR 1903.16. 454 CMR 25.03(6) provides for employer and employee representatives to accompany an inspector during the inspection.

The DLS has the authority to remedy retaliation for a State or local Government worker who filed a complaint, instituted any proceeding, testified, or exercised any rights afforded under the Massachusetts State Plan pursuant to the requirement in M.G.L. c. 149, § 6½ such that Massachusetts State and local Government workers have at least the level of protection they would have under OSHA. In addition, 454 CMR 25.02 incorporates OSHA's regulation 29 CFR part 1977—Discrimination Against Employees Exercising Rights Under the Williams-Steiger Occupational Safety and Health Act of 1970. Massachusetts also has a Whistleblower's Protection statute, M.G.L. c. 149, § 185, that protects State and local Government employees and prohibits retaliation through a right of private civil action.

The DLS's authority to issue Civil Citations and penalties is established in M.G.L. c. 149, §§ 6 and 6½, 454 CMR 25.00, 454 CMR 29.00, and 29 CFR part 1903, as incorporated by 454 CMR 25.02. The Director has the discretion to issue civil penalties of up to \$1,000 per violation, pursuant to M.G.L. c. 149, § 6, and 454 CMR 29.04(2)(d). The DLS generally issues a Written Warning as the first enforcement action taken against a State or local Government employer. However, an employer's failure to correct a violation within the period of time specified in a Written Warning and Order to Correct issued by the DLS may result in the issuance of a Civil Citation or other enforcement action. The DLS may also issue penalties as a first method of enforcement, without a prior written warning, depending on the gravity of the violation and when the violation warrants such action. The DLS has authority to take other enforcement actions, including issuing a Stop Work Order in cases of imminent danger or other cases as deemed appropriate, and the Massachusetts Attorney General may bring a civil action for declaratory or injunctive relief where necessary.

The DLS has sole authority for administration and enforcement of State and local Government occupational safety and health within Massachusetts. Prior to adopting or amending regulations, the DLS will consult with the Massachusetts Occupational Health and Safety Hazard Advisory Board pursuant to M.G.L. c. 149, § 6½(d). Other DLS programs are separate from the WSHP with independent authority and will not detract any resources or priorities assigned to the administration of the Massachusetts State Plan. When appropriate, the other programs may support the WSHP to improve workplace safety and compliance.

The DLS currently has eleven inspectors, seven safety inspectors, and four health inspectors, all of whom perform duties related to both enforcement and consultation. If granted initial approval, the DLS will add three safety enforcement inspectors. The DLS will redesignate two of its safety enforcement inspectors and one health inspector to exclusively perform consultation. These re-designated employees will be part of a separate consultation division with distinct supervision from the enforcement inspectors. The DLS will also train one supervisor and two enforcement inspectors to conduct whistleblower investigations.

29 CFR 1956.10(g) requires that State Plans for public employees provide a sufficient number of adequately trained and qualified personnel necessary for the enforcement of standards. The compliance staffing requirements (or benchmarks) for State Plans covering both the private and public sectors are established based on the “fully effective” test established in AFL-CIO v. Marshall, 570 F.2d 1030 (D.C. Cir. 1978). This staffing test and the complex formula used to derive benchmarks for Full Coverage Plans is not intended, nor is it appropriate, for application to the staffing needs of State Plans for occupational safety and health programs covering only State and local Government workers. However, the DLS has given satisfactory assurance in its Plan that it will meet the staffing requirements of 29 CFR 1956.10. The State has also given

satisfactory assurances of adequate State matching funds (50 percent) to support the Plan and is requesting initial Federal funding of \$1,250,000, for a total initial program effort of \$2,500,000.

Although the State statute, M.G.L. c. 149, § 6½, sets forth the general authority and scope for implementing the Massachusetts State Plan, if granted initial approval, the Massachusetts State Plan will be developmental under the terms of 29 CFR 1956.2(b), in that specific rules, regulations, and implementing procedures must still be adopted or revised to carry out the Plan and make it structurally “at least as effective” as Federal OSHA and fully operational. As previously noted, the Massachusetts State Plan sets forth a timetable for the accomplishment of these and other developmental steps within three years of Plan approval, as described in the Massachusetts State Plan narrative that is included in the docket of this rulemaking at www.regulations.gov. This timetable includes the amendment of certain Massachusetts State Plan regulations, the adoption of certain OSHA regulations, the development of a Technical Manual, transition to use of the OSHA Information System, the development of an Annual Performance Plan and a Five-Year Strategic Plan, completion of training requirements, and implementation of other policies, procedures, and instructions necessary for the operation of a program that is at least as effective as Federal OSHA in its enforcement of occupational safety and health standards.

IV. Effect of Initial Approval

After review of any written comments received and of information received in the event of a public hearing, the Assistant Secretary will grant initial approval of the Massachusetts State Plan if the Assistant Secretary determines that the Plan meets the criteria set forth in the Act and applicable regulations at 29 CFR part 1956. The Assistant Secretary will provide notification of this determination and amendment of the *Code of Federal Regulations* in the *Federal Register*. Massachusetts already has authority to

enforce and is carrying out enforcement of its occupational safety and health standards in Massachusetts places of State and local Government employment. However, a determination by OSHA to grant the Massachusetts State Plan initial approval will make Massachusetts eligible to apply for and receive up to 50% matching Federal grant funding, as authorized by the OSH Act under section 23(g) (29 U.S.C. 672(g)). In addition, such determination will signify the beginning of the Massachusetts State Plan's 3-year developmental period, during which Massachusetts will be required to address the developmental steps identified in the Massachusetts State Plan narrative that is included in the docket of this rulemaking at www.regulations.gov (29 CFR 1956.2(b)(1)). OSHA will publish a certification Notice in the *Federal Register* to advise the public once Massachusetts has completed all developmental steps (29 CFR 1956.23; 29 CFR 1902.33; 1902.34).

V. Documents of Record

All information and data presently available to OSHA relating to this proceeding have been made a part of the record and placed in the OSHA Docket Office. Most of these documents have also been posted electronically at www.regulations.gov, which is the Federal e-Rulemaking Portal; however, some information (e.g., copyrighted material) is not publicly available to read or download through that website. In addition, the State Plan, the narrative describing the Massachusetts State Plan in detail, and written comments received can be made available by contacting OSHA's Office of State Programs at (202) 693-2200 or the office of the Assistant Regional Director for Region 1 at (617) 565-9860.

VI. Public Participation

The Assistant Secretary's decision whether to grant initial approval to the Massachusetts State Plan will be made after careful consideration of all relevant information presented in the rulemaking (29 CFR 1956.20; 29 CFR 1902.20(b)(1)(i)). To

aid the Assistant Secretary in making this decision, OSHA is soliciting public participation in this process.

Notice in the State of Massachusetts: The DLS must publish appropriate notice within the State of Massachusetts within five days of publication of this notification, announcing OSHA's proposal to approve a Massachusetts State Plan, contingent on the availability of appropriated funds, and giving notice of the opportunity for public comment.

Written comments: OSHA invites interested persons to submit written data, views, and comments with respect to this proposed initial State Plan approval. These comments must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. When submitting comments, persons must follow the procedures specified above in the sections titled “**DATES**” and “**ADDRESSES**”. Written submissions must clearly identify the issues addressed and the positions taken with respect to each issue. Comments received by the end of the specified comment period will become part of the record and will be available for public inspection online at www.regulations.gov (Docket Number OSHA-2022-0008).

Informal public hearing: Pursuant to 29 CFR 1902.13(f), interested persons may request an informal hearing concerning the proposed initial State Plan approval. Such requests also must be received on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. When submitting comments, persons must follow the procedures specified above in the sections titled “**DATES**” and “**ADDRESSES**.” Such requests must present particularized written objections to the proposed initial State Plan approval. Within 30 days of the close of the comment period, the Assistant Secretary will review all comments submitted and review all hearing requests. OSHA will hold the informal hearing if the Assistant Secretary finds that substantial objections have been filed. However, if, after reviewing the comments

received during the written comment period, the Assistant Secretary finds that no substantial objections have been filed, then no informal public hearing will be held.

VII. Determination

The Assistant Secretary will, within a reasonable time after the close of the comment period or after the certification of the record if a hearing is held, publish a decision regarding initial approval of the Massachusetts State Plan in the *Federal Register*. All written and oral submissions, as well as other information gathered by OSHA, will be considered in any action taken.

VIII. Regulatory Flexibility Act

OSHA certifies pursuant to the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 et seq.) that the proposed initial approval of the Massachusetts State Plan will not have a significant economic impact on a substantial number of small entities. By its own terms, the Plan will have no effect on private sector employment and is limited to the State of Massachusetts and its political subdivisions. Compliance with State OSHA standards is required by State law; Federal approval of a State Plan imposes regulatory requirements only on the agency responsible for administering the State Plan. Accordingly, no new obligations would be placed on State and local Government employers as a result of Federal approval of the Massachusetts State Plan. The approval of a State Plan for State and local Government employers in Massachusetts is not a significant regulatory action as defined in Executive Order 12866.

F. Federalism

Executive Order 13132, "Federalism," emphasizes consultation between Federal agencies and the States and establishes specific review procedures the Federal government must follow as it carries out policies which affect State or local Governments. OSHA has consulted extensively with Massachusetts throughout the development, submission, and consideration of its proposed State Plan. Although OSHA

has determined that the requirements and consultation procedures provided in Executive Order 13132 are not applicable to initial approval decisions under the Act, which have no effect outside the particular State receiving the approval, OSHA has reviewed the proposed Massachusetts initial approval decision and believes it is consistent with the principles and criteria set forth in the Executive order.

List of Subjects in 29 CFR part 1952

Approval, State Plans.

Authority and Signature

Douglas L. Parker, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, authorized the preparation of this notification. OSHA is issuing this notification under the authority specified by Section 18 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 667), Secretary of Labor's Order No. 8-2020 (85 FR 58393 (Sept. 18, 2020)), and 29 CFR parts 1902 and 1956.

Signed in Washington, DC.

Douglas L. Parker,

Assistant Secretary of Labor for Occupational Safety and Health.

For the reasons stated in the preamble, OSHA proposes to amend 29 CFR part 1952 as follows:

PART 1952—APPROVED STATE PLANS FOR ENFORCEMENT OF STATE STANDARDS

1. The authority citation for part 1952 is revised to read as follows:

Authority: Sec. 18, 84 Stat. 1608 (29 U.S.C. 667); 29 CFR part 1902; Secretary of Labor's Order No. 1–2012 (77 FR 3912, Jan. 25, 2012), or 8-2020 (85 FR 58393, Sept. 18, 2020), as applicable.

Subpart B—List of Approved State Plans for State and Local Government

Employees

2. Add § 1952.29 to read as follows:

§ 1952.29 Massachusetts.

(a) The Massachusetts State Plan for State and local Government employees received initial approval from the Assistant Secretary on [DATE OF FINAL DETERMINATION].

(b) The Plan further provides assurances of a fully trained, adequate staff within three years of plan approval, including 8 safety and 3 health compliance officers for enforcement inspections, and 2 safety and 1 health consultants to perform consultation services in the public sector. The State has assured that it will continue to provide a sufficient number of adequately trained and qualified personnel necessary for the enforcement of standards as required by 29 CFR 1956.10. The State has also given satisfactory assurance of adequate funding to support the Plan.

(c) The plan only covers State and local Government employers and employees within the State. For additional details about the plan, please visit

<https://www.osha.gov/dcsp/osp/stateprogs/massachusetts.html>.